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# SUPREME COURT OF THE UNITED STATES

## October Term, 1938

No. 260

DIXIE OHIO EXPRESS COMPANY,
*Appellant,*

vs.

STATE REVENUE COMMISSION OF GEORGIA, ET AL.,
*Appellees.*

## BRIEF FOR APPELLEES

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December 5, 1938.

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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1938.

DIXIE OHIO EXPRESS COMPANY, *Appellant*,
vs.
STATE REVENUE COMMISSION, ET AL., *Appellees*.
No. 260

## BRIEF FOR APPELLEES

## STATEMENT OF CASE

This case originated in the Superior Court of Fulton County, Georgia, where the trial court sustained a general demurrer to an affidavit of illegality filed by appellant to an execution issued by the State Revenue Commission of Georgia under the provisions of the Motor Bus Maintenance Tax Act, approved March 30, 1937 (Georgia Laws, 1937, pages 155–167). The Supreme Court of Georgia affirmed the judgment of the trial Court and the case is here on appeal.

## STATUTE INVOLVED

A copy of the Act involved is set out in the appendix to the brief of counsel for appellant. By Section 1, it is provided that all persons, firms, corporations, or associations holding title to a motor bus, truck and/or trailer, or having exclusive right to the use thereof for a period of more than thirty (30) days, shall *pay a maintenance tax for the operation of such motor bus, truck and/or trailer upon and over the public roads of this State.* (Italics supplied). Said maintenance tax is to be levied in addition to any and all other taxes, licenses or registration fees required under existing law. The entire amount of the tax collected is, by the terms of the Act, allocated "to the United States Rural Post Roads Division of the

State Highway Department of Georgia, to be expended through the Director thereof, and said money shall be prorated among the several counties of this State according to the number of miles of rural post roads in said counties". (See Section 11 of the Act.) No provision is made for deducting the expense of collection or any part of the tax collected for regulatory purposes.

By Section 2 of the Act certain terms are defined, and by Section 3, the schedule of license fees to be exacted is set out. There are three classifications provided. One is the license fee for the operation of passenger carrying motor buses; another provides the license applicable to and exacted from persons operating non-passenger carrying motor vehicles or trucks not used as contract or common carriers for hire; the third schedule applies to non-passenger carrying motor vehicles or trucks used as common or contract carriers for hire. The license fees prescribed are different under each classification. There is also a classification applying to trailers or semi-trailers and in each of the main classifications above referred to, the trucks or buses are classified according to weight or manufacturer's rated capacity, and the tax fixed according to a graduated scale; that is to say, the larger or heavier or the greater the rated capacity of the truck or bus, the larger the amount of tax exacted.

Section 10 provides that all persons, firms, corporations, or associations, whether resident or non-resident, making or causing to be made by or through any of their agents, servants or employees more than two trips per month into the State with any of the vehicles named shall be liable to and shall pay the tax provided for, except that any of the named vehicles hauling seasonable agricultural products, etc., may make as many as ten trips per month without paying the taxes.

The statute does not undertake to make any difference between the fees or charges applicable to persons operating interstate and the fees applicable to persons operating intrastate. The fee is the same without reference to whether the particular operations are interstate or intrastate. There is

nothing in the Act to indicate that its provisions are aimed at interstate carriers, as such. All carriers falling within any particular classification are treated alike.

Appellant is engaged solely in the transportation business by motor vehicle as a common carrier of commodities general, operating entirely interstate (R. 3, 4).

## LEGAL QUESTIONS PRESENTED

The questions presented by the record are:

(1) Whether or not the Georgia Statute is repugnant to the commerce clause of the Constitution of the United States for any of the reasons set out in the assignment of errors (R. 38, 39).

(2) Whether or not the Georgia Statute is repugnant to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States for any reason urged in the assignment of errors (R. 39, 40).

## ARGUMENT AND CITATION OF AUTHORITIES

The trial court sustained a demurrer to the affidavit of illegality which sought to raise the Constitutional questions as a defense to the execution levied. The Supreme Court of Georgia affirmed this judgment and we wish particularly to call the Court's attention to the opinion of the Georgia Supreme Court, (R. 26–37). This opinion and judgment seems to us to answer every question presented, correctly, clearly and convincingly. But since the judgment is to be reviewed by this Court, we wish first to call attention to certain well established principles and tests which must be applied and made when it is sought to strike down a law regularly enacted by a legislative body.

### 1. PRESUMPTION AND BURDEN OF PROOF.

First of all, the statute is presumed to be constitutional and

this presumption extends to every ground of attack made by appellant.

In *Munn v. Illinois*, 94 U. S. 124, this court stated the rule as follows:

> "Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the Legislature should be sustained."

See also *Gitlow v. New York*, 268 U. S. 652; *Knoxville v. Knoxville Water Company*, 212 U. S. 1, 8; *Aetna Insurance Company v. Hyde*, 275 U. S. 440, 448; *Georgia Railway Co., v. Railroad Commission of Georgia*, 262 U. S. 625; *Townsend v. Yeomans*, 301 U. S., 441–459, 81 L. Ed. 1210, 57 S. Ct. 847; *South Carolina State Highway Department, Et Al v. Barnwell Bros., Inc., Et Al.* .... U. S. .....; 58 S. Ct. 510;

Furthermore, where classifications made in a statute are attacked as unreasonable and discriminatory, the burden is on the complaining party to show that there are no such differences between the class in which he falls and other classes treated differently as will justify the difference in treatment.

*Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495–531; 81 L. Ed. 1245; 57 S. Ct. 868–874.

In addition, the legislative body is not required to make "meticulous adjustments in an effort to avoid incidental hardships."

*Great A. & P. Tea Co., v. Grosjean*, 301 U. S. 412, 424; 81 L. Ed. 1193, 1200; 57 S. Ct. 776; *New York Rapid Transit Co. v. City of New York.* .... U. S. ....; 58 S. Ct. 721, 726 (decided by this Court March 28, 1938).

**2. THE STATUTE IS NOT REPUGNANT TO THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION FOR ANY REASON ASSIGNED.**

It has long been conceded that a state may levy a tax,

reasonable in amount, as compensation for the privilege of using the highways of such state by motor carriers and this is true, even though the particular motor carrier be engaged exclusively in interstate commerce. In *Hendricks vs. Maryland*, 235 U. S., 610, 624, the identical question was considered, and at pages 623 and 624, the Court said:

> "In view of the many decisions of this Court, there can be no serious doubt that where a state, at its own expense, furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the State itself and so long as they are reasonable and are fixed according to some uniform, fair and practical standard they constitute no burden on interstate commerce".

See also *Kane v. New Jersey*, 242 U. S. 160, 168, 169, 67 L. Ed. 222, 37 S. Ct. 30; *Clark v. Poor*, 274 U. S. 554, 71 L. Ed. 1199, 47 S. Ct. 702; *Sprout v. South Bend*, 277 U. S. 163, 169, 170, 72 L. Ed. 853, 48 S. Ct. 502; *Interstate Buses Corp. v. Blodgett*, 276 U. S. 245, 250-252, 72 L. Ed. 551, 48 S. Ct. 230; *Ingels v. Morf*, 300 U. S. 290, 81 L. Ed. 653, 57 S. Ct. 439; *Carley & Hamilton v. Snook*, 281 U. S. 66, 74 L. Ed 704; *Aero Mayflower Transit Co. v. Ga. Public Service Commission*, 295 U. S. 285, 79 L. Ed. 1445; *South Carolina State Highway Department v. Barnwell Bros. et al*, .... U. S. ...., 58 S. Ct. 540.

*In Interstate Transit Company v. Lindsey*, 283 U. S., pages 183, 186, the Court, amplifying the rule, said:

> "While a state may not lay a tax on the privilege of engaging in interstate commerce (*Sprout v. South Bend*, 277 U. S. 163, 72 L. Ed. 833, 62 A. L. R. 45, 48 S. Ct. 502), it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining

them and of regulating the traffic thereon (*Kane v. New Jersey*, 242 U. S. 160, 168, 169; 61 L. Ed. 222, 227, 228; 37 S. Ct. 30; *Clark v. Poor*, 274 U. S. 554, 71 L. Ed. 1199, 47 S. Ct. 702; *Sprout v. South Bend*, supra, 169, 170 of 227 U. S., 48 S. Ct. 502. As such a charge is a direct burden on interstate commerce the tax can not be sustained unless it appears affirmatively, *in some way*, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. *This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use, Interstate Busses Corp. v. Blodgett*, 276 U. S. 245, 72 L. Ed. 551, 48 S. Ct. 230, *or by the express allocation of the proceeds of the tax to highway purposes*, as in *Clark v. Poor* supra, or otherwise. *Where it is shown that the tax is so imposed it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory*". (Italics supplied)

See also *Ingels v. Morf*, 300 U. S. 290–296, 81 L. Ed. 653; *Morph v. Bingaman*, 298 U. S. 407–414, 80 L. Ed. 1245–1249.

The language of the court is so clear as to leave no doubt as to what is the true rule in such cases. As to interstate carriers, it must appear that the tax or charge is demanded as reimbursement for the expense of providing particular facilities used—in this case highways. This showing, however, may be supplied by the form of the statute itself, or the nature of the imposition of the tax such as a mileage tax directly proportioned to the use of the highway or by an express allocation of the proceeds of the tax to highway construction, and when such affirmative showing is supplied in any of the ways indicated, the burden is cast upon the taxpayer to show that the charge bears no reasonable relation to the privilege of using the highway, or is discriminatory as against the interstate carrier.

Attention has already been called to the fact that no distinction is made by the provisions of the Act between intrastate and interstate carriers. They are all treated exactly

alike and pay the same amount, provided only that they fall within the same class. There is not the slightest suggestion of an intentional discrimination as against the interstate carrier. Only one fee is exacted by the statute and when that fee or charge is paid the carrier's privilege of using all the highways of the State of Georgia is unlimited. Attention further has been called to the fact that the statute, by its terms, states at least in effect that the Maintenance Tax is levied for the privilege of using the public roads of the State of Georgia, and, in addition thereto, all of the funds collected are allocated to the United States Rural Post Roads Division of the State Highway Department, to be expended through the Director thereof and prorated among the several counties of the state according to the number of miles of rural post roads in such counties.

In view of the form of the statute and the allocation of the funds derived thereunder, we take it that under decisions of the Court the burden rests upon appellant to show, not by conclusions or generalities, but by well pleaded facts, that the charge as laid bears no reasonable relation to the privilege granted.

Furthermore, in view of the presumption indulged in favor of the constitutionality of the Act, the burden is a heavy one.

*Dayton Power & Light Co. v. Public Utilities Commission*, 292 U. S. 290.

The showing must be a convincing one.

*Coy v. Linder*, 183 Ga. 583; *Lindhimer v. Illinois Bell Telephone Co.*, 292 U. S. 151.

It must be such as to compel conviction.

*Georgia Railway Co. v. Railroad Commission of Georgia*, 262 U. S. 634.

The showing must be so clear, satisfactory and convincing as to leave no doubt.

*L. & N. Ry. Co. v. R. R. Commission*, 208 Fed. 35, 42.

**3. APPELLANT FAILS TO SHOW THAT AMOUNT OF TAX BEARS NO REASONABLE RELATION TO PRIVILEGE GRANTED.**

In the statement of points to be relied on in this Court (R. 41, paragraphs 2, 3) it is in effect contended that the Act is repugnant to the commerce clause of the Constitution of the United States for the reason that the amount of the tax bears no reasonable relation to the use made of highways of the State and we wish to discuss briefly that contention here.

The question, of course, is to be considered in the light of the general principles above stated. Further, the question is to be answered, not on the basis of what is the value of the privilege actually enjoyed by appellant, but the court must determine whether or not, under the allegations of fact as set out in the affidavit of illegality, it clearly and convincingly appears that the charge complained of bears no reasonable relation to the privilege granted. This observation is made because of the contention of appellant that its use of the highways of Georgia is, in a sense, restricted. That statement, however, if true, is immaterial. A similar question was presented and answered in the case of *Aero Mayflower Transit Co. vs. Georgia Public Service Commission*, 295 U. S. 285, 293; 79 L. Ed 1445. In that case a flat rate tax was involved and it was contended by the carrier that it used the highways of the state infrequently and should not be charged the same amount as those who used the highways regularly. With reference to the contention made, the Court said:

> "The Appellant urges the objection that its use of roads in Georgia is less than that by other carriers engaged in local business, yet they pay the same charge. The fee is not for the mileage covered by a vehicle. There would be administrative difficulties in collecting on that basis. The fee is for the privilege for a use as extensive as the carrier wills that it shall be. There is nothing unreasonable or appressive in a burden so imposed. Cf. *Clark v. Poor*, supra, *Hicklin v. Coney*, supra. One who receives a privilege without limit is not wronged by his

own refusal to enjoy it as freely as he may."

A flat rate fee only is exacted under the provisions of the Act. The privilege granted to the carrier is unlimited. If the use or enjoyment of the privileges is restricted in any sense, the fault does not lie with the Act, but with the carrier. In part, at least, the restricted use is a matter of choice and convenience to it, and while it is alleged that appellant operates under certificates of convenience issued by the Interstate Commerce Commission, it does not appear that it has sought or desires to operate over any routes except those particularly specified in the affidavit of illegality.

While we contend that the question of reasonableness of the fee exacted must be determined with reference to and in comparison with the value of the privilege granted and not merely with reference to the value of the privilege actually used, nevertheless, since appellant makes the contention that it is limited or restricted to the use of certain highways only, we desire to examine for a moment the scope of the privilege actually enjoyed by appellant as disclosed by its affidavit of illegality.

The principal office of appellant is Akron, Ohio, (R. 3). Involved in this case is one two-ton truck (R. 2). In the transcript of record, pages 12 and 13, there are set out the routes in the State of Georgia over which appellant may operate said two-ton truck. For instance, in proceeding south into the State of Georgia, at the Georgia-Tennessee line near Chattanooga, appellant finds a substantial paved highway with substantial bridges upon which to enter with its truck and cargo and from that point may proceed by Ringgold, Dalton, Calhoun, Cartersville, to Atlanta, and thence to Newnan, Hogansville, LaGrange and West Point (located on the Alabama line), or if appellant prefers and finds it convenient to do so in the operation of its business, it may proceed to Jonesboro, Griffin, Barnesville, Forsyth and Macon, or from Atlanta to McDonough, Jackson, Forsyth and Macon, or from Atlanta to Griffin, Zebulon, Thomaston, Americus and Albany. We will not list or refer to all highways over which

appellant may operate under permits shown to be held by it. Suffice it to say that practically every important market and trading center in the State of Georgia is available to it and every shipper in every such market and trading center is a potential customer. It is transacting its business for hire and the highways at its disposal are substantial highways, so that appellant may transport its trucks and cargo with a maximum of speed and a minimum of strain on its equipment. It is unlimited as to the extent of the use of the highways. It may operate the particular truck involved over these highways, or anyone of them twenty-four (24) hours per day, during every day of every week throughout the entire year. Its speed of operation and maximum load are limited only by the general law.

So much then for the scope of the privilege which appellant enjoys. And what is shown to be the cost?

In the affidavit of illegality there are several allegations respecting the total amount which the State of Georgia collects on its gasoline tax, its automobile registration fee, its $25.00 per year Public Service Commission regulatory fee and the maintenance tax here involved. Appellant, however, cannot be the champion of any rights except its own. *Hennefford v. Silas Mason, Inc.*, 300 U. S. 577–588. So the question is what is the amount exacted by the State of Georgia for the privilege of using the highways of the State over which appellant actually operates in the prosecution of its business as a common carrier for hire. The truck involved is a two-ton truck. Accordingly, under Section 3-C, Subdivision 4 of the Maintenance Tax Act of 1937, the annual charge or tax is only $75.00. Appellant is content with other taxes assessed against it by the State of Georgia (R. 9, paragraph 14, Affidavit of Illegality). It complains only of this particular tax and yet the amount exacted for the privilege actually enjoyed is less than twenty-one (21) cents per day. Appellant, however, does not contend, as we construe its affidavit of illegality, that the maintenance tax within itself is excessive, but claims that the maintenance tax is added to other taxes. This fact, however, is immaterial unless it is shown that the

total tax is unreasonable, *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245; 72 L. Ed. 551. And what other taxes are alleged to be exacted of appellant? In the affidavit of illegality it is alleged that a fee of $25.00 is required to be paid for registering with the Georgia Public Service Commission (R. 7). This charge, however, is primarily to pay for policing, regulation and inspection. Only the surplus is paid into the road fund for maintenance and construction. Georgia Code 1933, Section 68–663; *Aero Mayflower Transit Co., vs. Georgia Public Service Commission* 295 U. S. 285; 79 L. Ed. 1445. In addition, there is required a fee of $3.00 for registration and identification charged as against all motor vehicles operated in the State. This fee, too, is primarily for regulation and registration. Georgia Code 1933, Section 68–201 (Georgia Laws 1935, 157). Only the surplus is devoted to the maintenance and construction of highways. Georgia Code 1933, Section 95–1703. It is also contended that the driver's license fee in the amount of $2.00 is exacted but this fee is assessed against the driver and not the owner (Georgia Laws, 1937, 322, 341, 346), and the license fee therefor runs for two years (Georgia Laws 1937, 344), so that the fee is only $1.00 per annum. Appellant also makes reference to the gasoline tax but this tax is assessed against the distributor under the provisions of law, (Georgia Laws, 1937, 167, 174), and further, it is to be noted that there is no provision of Georgia law which requires appellant to purchase gasoline in the State of Georgia. It might purchase its gasoline outside of the State where there is no tax if it desired. But for the sake of argument, let the gasoline tax be added to the other taxes exacted. The allegations of the affidavit disclose that the average amount of gasoline tax paid for road maintenance purposes is $3600.00 per annum (R. 8 Affidavit of Illegality, paragraph 12) and that approximately one hundred (100) trucks are used by appellant in the State of Georgia in the consumption of this gasoline. If it be assumed therefore that the particular truck involved uses in the State of Georgia an average amount of gasoline, then the tax cost of the gasoline so used would be $36.00. Since the burden is on appellant to plead its case clearly, this assumption is fully justified. So that, taking the over all tax cost on this truck for the year for

its use and operation in the State, we have the following: $75.00 maintenance tax; $25.00 registration fee with the Georgia Public Service Commission; $8.00 license and registration tax; $36.00 gasoline tax and $1.00 driver's license, making a total of $140.00 as a charge for regulation, inspection, policing, and for use of the highways of the State of Georgia as a place of business in the prosecution of a private enterprise. The cost per day is less than thirty-nine (39) cents; a nominal sum indeed as compared with the privilege of using without limit the facilities which the State has provided at enormous expense and which are actually at the disposal of appellant.

In support of its contention that the fees exacted bear no reasonable relation to the privilege granted, appellant urges that during the year 1936 motor vehicles operating in the State paid to the State $19,207,909.59 in license and motor fuel taxes, and for the same year the State expended for highway construction and maintenance only $11,127,258.38, of which the Federal Government contributed $3,721,489.90. (R. 10, par. 19, and R. 21, Amendment, par. 4; Appellant's brief, Division VII, "Point C"). We know of no law, State or Federal, that requires the State to expend its highway funds during the same year they are collected, and we find nothing in the affidavit of illegality to indicate that the surplus, if any, for the year 1936 was not expended for highway construction or maintenance, either before or after that particular year.

Certainly it cannot be held that the facts disclose clearly and convincingly that the amount of the exaction bears no reasonable relation to the privilege actually enjoyed, and in the absence of such convincing showing appellant cannot prevail.

It may, of course, be true that the General Assembly could provide a tax more suitably adjusted to the particular business of appellant and its method of conducting the same. The Constitution, however, leaves to the General Assembly the widest discretion in the matter of assessing charges for the

facilities it provides. The Constitution does not require any state to formulate and adopt the best possible system of taxation. A state cannot be expected to enact its statutes with particular reference to every person's business. As was said by Mr. Justice Cardozo in the *Aero Mayflower Transit Company case*, "there would be administrative difficulties in collecting such a tax", and a State is entitled to take that fact into consideration.

See also *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495–531, 81 L. Ed. 1245, 57 S. Ct. 868.

The Act cannot be condemned because another method more nicely adjusted to the business of appellant might actually or theoretically have been adopted by the General Assembly.

*Great A. & P. Tea Co. v. Grosjean*, 301 U. S. 412, 424, 81 L. Ed. 1193, 1200, 57 S. Ct. 776.

It is submitted, therefore, that the pleaded facts do not show that there is no reasonable relation between the amount of the tax exacted and the value of the privilege granted or actually used.

**4. STATUTE NOT REPUGNANT TO COMMERCE CLAUSE BECAUSE TAX USED TO CONSTRUCT OR MAINTAIN ROADS NOT USED BY APPELLANT.**

In the statement of points to be relied on (R. 41, Subdivision 1) we are advised that appellant expects to contend that the statute is repugnant to the Commerce Clause of the Constitution of the United States for the reason, as appellant contends, that the proceeds of the tax are to be expended in maintaining roads which appellant does not use.

The contention is without merit. The affidavit of illegality (R. 12, 13) discloses a large number of highways actually used by appellant in the operation of its business as a common carrier for hire. Said highways have been constructed at the State's expense. It is not disclosed by appellant's affidavit

of illegality just who provided the funds to the State for the construction of these highways and we are sure that appellees could not furnish the information. Suffice it to say that the roads have been constructed and that appellant is using them. Certainly it cannot be expected that a tax exacted from any particular carrier must be used by the State in the construction or maintenance of the highways only used by such carrier. Such a statute would involve insuperable administrative difficulties.

A similar contention was considered by the Court first in *Clark v. Poor*, 274 U. S. 554, 557, and again in *Morf v. Bingaman* 298 U. S. 407; 56 S. Ct. 756. In the *Clark case* at page 557 the Court, speaking through Mr. Justice Brandeis, said:

> "It is said that all of the tax is not used for maintenance and repair of the highways; that some of it is used for defraying the expenses of the commission in the administration or enforcement of the Act; and some for other purposes. This, if true, is immaterial. Since the tax is assessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs."

In the *Morf case*, at page 412 of 298 U. S. (page 758 of 56 S. Ct) the Court answered the contention as follows:

> "As the tax is not on the use of the highways but on the privilege of using them, without specific limitation as to mileage, the levy of a flat fee not shown to be unreasonable in amount, rather than of a fee based on mileage, is not a forbidden burden on interstate commerce. See *Clark v. Poor, supra Aero; Mayflower Transit Co. v. Georgia Public Service Commission, supra.*

> "Nor is it important that a part of the fees collected is not devoted directly to highway maintenance, the cost of which the State pays in part from the proceeds of a general property tax. The use for highway maintenance

of a fee collected from automobile owners may be of significance, when the point is otherwise in doubt, to show that the fee is in fact laid for that purpose and is thus a charge for the privilege of using the highways. *Interstate Transit Co., Inc. v. Lindsey, supra.* But where the manner of the levy, like that prescribed by the present statute, definitely identifies it as a fee charged for the grant of the privilege, it is immaterial whether the State places the fees collected in the pocket out of which it pays highway maintenance charges or in some other."

The Court's holding is directly in point. The statute involved here definitely identifies the fees collected as laid for the privilege of using the highways of the State. Appellant operates over highways which have been constructed and are being maintained by the State from taxes derived from appropriate sources. The highways which appellant uses are facilities provided at the expense of the State of Georgia and whether the State uses the identical taxes collected for repair and maintaining the particular highway so used is wholly immaterial. Appellant cannot refuse to pay for the privilege of using the highways over which it operates on the ground that the fee so charged is expended in constructing or improving other roads which it might but does not in fact use.

See also *Lee v. The State*, 163 Ga., 238; *Wisconsin Allied Truck Owners Association v. Public Service Commission of Wisconsin*, 207 Wis., 664; 242 N. W. 668.

**5. STATUTE NOT REPUGNANT TO COMMERCE CLAUSE BECAUSE OF DISCRIMINATION AGAINST CARRIERS FOR HIRE AND IN FAVOR OF CARRIERS NOT FOR HIRE.**

In the statement of points to be relied on (R. 42; Par. 4) it is suggested that the statute is repugnant to the commerce clause of the Federal Constitution for the reason, as appellant contends, that the "tax discriminates against carriers for hire in favor of carriers not for hire".

We cannot understand how this fact, if true, is affected by

the commerce clause. Carriers not for hire using the same capacity trucks are equally taxed without regard to whether the operations are interstate or intrastate. The same thing is true with respect to common or contract carriers for hire, and using the same capacity trucks. And while it is true that a carrier not for hire operating interstate does not pay the same amount under the provision of the Act as appellant pays, appellant obviously overlooks the fact that the commerce clause of the Federal Constitution within itself has nothing to say of discrimination or unequal treatment as between a carrier for hire and a carrier not for hire. If appellant has any protection against discrimination as between itself and carriers not for hire under the Federal Constitution, such protection comes from the equal protection clause of the Fourteenth Amendment and not the commerce clause.

**6. STATUTE NOT REPUGNANT TO EQUAL PROTECTION CLAUSE OF FOURTEENTH AMENDMENT.**

Appellant makes the further contention that the Georgia Statute is unconstitutional, in that, the same is repugnant to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States for the reason, as it contends, the tax discriminates against carriers for hire and in favor of carriers not for hire (R. 42; Par. 5 of Statement of Points relied on). The contention is not justified. It can no longer be questioned that a state, through its legislative body, may make classifications of subjects for taxation. The only requirement is that in so doing the classification so made shall have a rational basis. Unquestionably, the General Assembly of Georgia may, for difference of treatment in the assessment of charges, make classification of carriers by a truck and make as one class those operating for hire, either as contract or common carriers and as another class, those carriers operating not for hire. A rational basis for such classification is apparent. The carrier not for hire transports over the highways his own goods or property. He uses the highways only as the circumstances and exigencies of his own business require. His use of the highways is incidental only. While the carrier for hire operates over the highways trans-

porting property of others and charges compensation therefor. He makes the highways his place of business and the natural tendency, of course, will be for him to use the highway more, truck for truck, than does the carrier not for hire.

The Courts of last resort in many cases have held in effect that the classification is justified; that the law making body may even tax the common carrier for hire using the highways and exempt altogether the carrier not for hire. If that can be done, certainly the General Assembly of Georgia, without violating any constitutional right, can make a classification on the basis of those who operate as common carriers for hire and those who operate as carriers of their own goods not for hire and provide a different schedule of charges applicable to the two classes respectively.

*Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 57 S. Ct. 868; *Aero Mayflower T. Co. v. Ga. Public Service Commission*, 295 U. S. 285, 55 S. Ct. 709; *Continental Baking Co. v. Woodring*, 286 U. S. 352, 52 S. Ct. 595; *Clark v. Poor*, 274 U. S. 554, 47 S. Ct. 702; *Morf v. Bingaman*, 56 S. Ct., 756, 298 U. S. 407; *Bekins Van Lines v. Riley*, 280 U. S. 80, 82, 50 S. Ct. 64; *Stephenson v. Binford*, 287 U. S. 251, 77 L. Ed. 288, 53 S. Ct. 181; *Raymond v. Holm*, 165 Minn. 215; *State v. King*, ....Me..... 188 A. 775; *People v. Duntley*, 217 Cal. 1150, 17 Pac. (2d) 715; *State v. Lefevre*, 174 Minn. 248; *Hicklin v. Coney*, 290 U. S. 169, 54 S. Ct. 142; *Iowa Motor Vehicle Association v. Board of RR. Commissioners*, 207 Iowa 461; *Holmes v. RR Commission of California*, 197 Cal. 627, 242 Pac. 486; *Collins-Deitz-Morris Co. v. State Corporation Commission*, 154 Okla. 121, 7 Pac. (2d) 125, 80 A. L. R. 561.

See also *Annotations*, 109 A. L. R. 566–569.

## CONCLUSION

In conclusion, we wish again to make reference to the opinion of the Georgia Supreme Court in this case. The ruling made by it is based upon many decisions of this Court and other Courts, some of which are cited herein. We think there

can be no doubt but that the Georgia Court correctly decided the case and its judgment should be affirmed.

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES.

No. 260.—October Term, 1938.

Dixie Ohio Express Company, Appellant, *vs.* State Revenue Commission of Georgia, et al. } Appeal from the Supreme Court of the State of Georgia.

[January 30, 1939.]

Mr. Justice Butler delivered the opinion of the Court.

The question is whether, as applied in this case by the highest court of the State, the Georgia Maintenance Tax Act[1] violates the commerce clause or the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.

Appellant is an Ohio corporation engaged exclusively in interstate transportation as a common carrier of property for hire by motor vehicles, including hauling between points in Georgia and points in other States. A certificate of convenience and necessity issued by the Interstate Commerce Commission authorizing appellant's interstate transportation in Georgia,[2] does not extend to transportation over rural post roads, which are roads not included in the state highway system over which United States mail is carried.[3]

Appellant owns for use in its business about 100 pieces of equipment consisting of trucks and tractors with manufacturer's rated capacity of a ton and a half and two tons and trailers having factory weight of 4,000 pounds. If used to haul not for hire, the tax on each ton-and-a-half motor vehicle is $15; on each two-ton vehicle, $30; and on each trailer, $30. But when used to haul either as a common or contract carrier for hire, the taxes are respectively, $50, $75, and $50. § 3.

For the collection of tax on one of appellant's two-ton trucks, the state revenue commission obtained from the superior court of Ful-

[1] Laws 1937, p. 155.

[2] § 206, Motor Carrier Act, 1935, 49 Stat. 551, 49 U. S. C. § 306.

[3] Laws 1937, p. 914.

ton County an execution on which it caused the sheriff to levy upon that vehicle. Appellant gave a bond to the sheriff with an affidavit of illegality.[4] In order to avoid seizure of all of appellant's equipment, the state commission allowed it to deposit in escrow the amount claimed under the Act on account of other equipment and agreed that levy should be made only on the one truck. The commission demurred; the superior court sustained the demurrer and dismissed the affidavit. The supreme court affirmed. 186 Ga. 228.

In addition to the description of appellant's equipment, operations, and use of Georgia highways given above, the statements of the affidavit of illegality, so far as concerns the issues here to be decided, may be summarized as follows:

The Act directs that upon payment of the maintenance tax the director of the motor vehicles division of the state commission shall issue a tag (§ 9), and that the money derived from the sale of these tags shall be allocated to the United States rural postal roads division of the Georgia highway department. § 11. Thus, no part of it is applicable to highways over which appellant operates. The maintenance taxes on its equipment for each year will be about $6,000. In addition, the Georgia laws require it to pay $3 for a license tag[5] and $25 for a public service tag[6] for each vehicle and six cents per gallon of gasoline purchased in Georgia;[7] it annually buys in that State about 90,000 gallons. Two-thirds of the gasoline tax is for maintenance of state aid highways.[8] Appellant hauls in seven States; annually its trucks travel an average of 6,870,000 miles of which 725,000, less than 11 per cent of the total, are in Georgia. The 1936 total taxes collected by Georgia amounted to $30,058,092.68, of which motor vehicles bore $19,207,909.59 in license and fuel taxes.

In conclusion, the affidavit asserts that the tax in question is an unreasonable fee for appellant's use of the roads and is therefore repugnant to the commerce clause, and that it discriminates against carriers for hire in favor of carriers not for hire and for that reason violates the equal protection clause of the Fourteenth Amendment.

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[4] Code 1933, § 92-7301.
[5] Laws 1935, p. 157.
[6] Code 1933, § 68-623.
[7] Laws 1937, p. 174.
[8] Laws 1937, p. 180.

1. Is the Act repugnant to the commerce clause?

With exceptions not material here, it requires that all who own or have exclusive right to use for more than 30 days a motor bus, truck,[9] or trailer "shall pay a maintenance tax for operation . . . upon and over the roads of the State" (§ 1) according to a schedule (§ 3) which specifies the amount of the tax on each vehicle. The Act makes no distinction between vehicles used in intrastate commerce and those used in interstate commerce. It discriminates in favor of equipment used not for hire. It lays upon trucks and tractors taxes graduated according to manufacturer's rated capacities and upon trailers amounts graduated according to factory weights. The tax imposed on appellant is the same as if it operated exclusively in intrastate commerce or carried on both intrastate and interstate transportation.

It is elementary that a State may not impose a tax on the privilege of engaging in interstate commerce. *Sprout* v. *South Bend*, 277 U. S. 163, 171. *Interstate Transit, Inc.*, v. *Lindsey*, 283 U. S. 183, 185. *Gwin, White & Prince, Inc.* v. *Henneford*, (decided January 3, 1939), — U. S. —, and cases there cited; also those cited in the concurring opinion. But, consistently with the commerce clause, a State may impose upon vehicles used exclusively for interstate transportation a fair and reasonable tax as compensation for the privilege of using its highways for that purpose. The applicable principle is stated in *Hendrick* v. *Maryland*, 235 U. S. 610. We there said (pp. 623-624): "In view of the many decisions of this court there can be no serious doubt that where a State at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the State itself; and so long as they are reasonable and are fixed according to some uniform, fair, and practical standard, they constitute no burden on interstate commerce." That rule has been applied in many cases. See e. g. *Kane* v. *New Jersey*, 242 U. S. 160, 168-169. *Clark* v. *Poor*, 274 U. S. 554, 557. *Sprout* v. *South Bend, supra*, 170. *Aero Transit Co.* v. *Georgia Comm'n*, 295 U. S. 285, 289. *Morf* v. *Bingaman*, 298 U. S. 407, 412. While ordinarily state action is deemed valid

[9] The Act defines "truck" to "include any self-propelled vehicle designed . . . for drawing other vehicles, but having no provision for carrying loads independently, except what are commonly known as farm tractors." § 2B.

unless the contrary appears, we have held that to sustain a charge by the State for the use or privilege of using its roads for interstate transportation, it must affirmatively appear that the charge is exacted as compensation or to pay the cost of policing its highways. *Sprout* v. *South Bend, supra. Interstate Transit, Inc.* v. *Lindsey, supra,* 186. *Ingels* v. *Morf,* 300 U. S. 290, 294.

The scope and language of the challenged enactment unmistakably disclose intention of the State to require payment of compensation for the privilege of operating over its roads the specified vehicles for the transportation of property. It contains no hint of hostility to interstate commerce or of purpose to impose a charge on the privilege or business of interstate transportation. The exaction is not to be deemed offensive to the commerce clause merely because the State, in the conduct of its fiscal affairs, chooses to use part or all of the proceeds for purposes other than the construction, improvement, or maintenance of its highways. *Clark* v. *Poor, supra,* 557. *Morf* v. *Bingaman, supra,* 412.

The affidavit of illegality fails to allege any facts tending to show that a reasonable charge for the privilege is less than the amount exacted for it. Appellant does not claim that the privilege to operate for a year 100 pieces of its equipment over any or all the State's roads is not worth $6,000, the amount of the taxes in controversy. It does not disclose what the taxes in question amount to per truck, tractor, or trailer mile, per ton hauled, or per ton mile, nor does it compare the amount of the taxes with total operating expenses or with operating revenues. The figures furnished indicate that the tax imposed on account of the use of each vehicle amounts to about 20 cents a day and that, on appellant's business in 1936, it was about eight mills per vehicle mile. The amounts paid for license tags, public service tags, and taxes on gasoline are without significance in this case. *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245, 251-252. The allegation to the effect that in 1936 motor vehicles in Georgia bore, in license and fuel taxes, over 62 per cent of the total taxes collected by the State is too vague for use in any estimate of or study for the ascertainment of the value of appellant's use, or of its privilege to use, the State's roads.

Appellant's failure to disclose whether it fully availed itself of the privilege to use the roads leaves the figures reflecting actual use without foundation and worthless as a measure or indication

of the value of that privilege. And, in view of the seemingly low charge for the operation of its vehicles per day or mile, its failure to furnish evidentiary details material to the issue of reasonableness makes against its contention that the challenged exactions so exceed the worth of the granted use of the roads that they are to be deemed taxes on the privilege of carrying on its business of interstate transportation and tends to confirm appellee's claim that they constitute pay for the specified operations over the State's roads.

We find that the challenged enactment does not violate the commerce clause.

2. Is the Act repugnant to the equal protection clause? Appellant insists that it is because of the higher taxes imposed on those who haul for hire. But it fails to show lack of facts sufficient to justify the discrimination. In the absence of proof to the contrary, it is to be assumed that the use of the roads by one hauling not for hire is generally limited to transportation of his own property as an incident to his occupation or business and that it is substantially less than that of one who is engaged in the business of common carrier thereon for hire. As hauling not for hire is likely to be occasional and accessory and as hauling for hire is a business the success of which depends on the loading of the vehicles used and mileage made by them, the classification complained of may not be held arbitrary or without reasonable foundation. *Morf* v. *Bingaman, supra,* 413. *Aero Transit Co.* v. *Georgia Comm'n, supra,* 290, 291. *Hicklin* v. *Coney,* 290 U. S. 169, 176, 177. *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, 370, 371, *et seq.* *Bradley* v. *Pub. Util. Comm'n,* 289 U. S. 92, 97. *Alward* v. *Johnson,* 282 U. S. 509, 513-514. *Bekins Van Lines* v. *Riley,* 280 U. S. 80, 82. *Packard* v. *Banton,* 264 U. S. 140, 144. Appellant's contention that the Act violates the equal protection clause is without merit.

*Affirmed.*

Mr. Justice BLACK concurs in the result.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.